220.0504

(916) 324-6594

April 29, 1986

Mr. Rick Massa
Deputy Assessor
Office of the Marin County
Assessor-Recorder
Administration Building
Civic Center
P. O. Box C
San Rafael, CA 94913

Reappraisal of Properties, Marin County

Dear Mr. Massa:

This letter is in reply to your letter to Mr. James J. Delaney dated April 2, 1986, in which you request our opinion with respect to the following facts set forth in your letter.

Various parcels of property in Marin County were held in title by M and I , his wife, as community property as to an undivided one-half interest, and W and D , his wife, as community property as to an undivided one-half interest.

M and I , and W and D granted the subject properties to Brothers, a partnership by deed recorded January 3, 1985.

A "Statement of Partnership" was recorded on January 22, 1985, which names the partners as M , I , W , D , Carl and Nancy

The Marin County Assessor made a 100% reappraisal of the property as of January 3, 1985, resulting from the above-mentioned transfer, pursuant to Property Tax Rule 462(j).

The filed an appeal in which they contend that the were included in the partnership in error, and that the intent of the partnership was not to change the ownership interests in real property and that the transfer

of title be excluded from reappraisal pursuant to Property Tax Rule 462(j)(2)(B).

An instrument amending the partnership agreement was recorded on October 24, 1985 in which the have been removed from the partnership.

Based on the foregoing facts, you ask the following questions.

1. Are we correct in considering the January 3, 1985 transfer a change in ownership requiring full reappraisal for the 1985-86 assessment year and the resulting supplemental assessment?

Revenue and Taxation Code, Section 62 provides in pertinent part that change in ownership shall not include:

> (a)(2) any transfer between...individuals and a legal entity...which results solely in a change in the method of holding title to the real property and in which the proportional ownership interests of the transferors and transferees, whether represented by stock, partnership interest, or otherwise, in each and every piece of real property transferred remain the same after the transfer.

Rule 462(j)(2)(B) states that excluded from a change in ownership are:

> Transfers of real property between separate legal entities or by an individual(s) to a legal entity (or vice versa), which result solely in a change in the method of holding title and in which the proportional ownership interests in the property remain the same after transfer.

The taxpayers argue that the foregoing provisions are applicable because no gifts of partnership interests to the were made prior to the time the partnership agreement was amended to exclude the as partners. In effect, taxpayers argue that the did not receive any interest in the Brothers partnership when the partnership agreement was executed by the and the or at any time thereafter so that the proportional

ownership interests of the in the real property transferred to the partnership remains the same after the transfer as it was before the transfer.

Since "[a] partner is co-owner with his partners of specific partnership property holding as a tenant in partnership (Corp. C. 15025(1)), the issue here is whether the became partners in a partnership with the

The applicable rules were stated by the court in Constans v. Ross (1951) 106 Cal.App.2d 381, 386, as follows:

> "The question of the existence of a partnership depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances. (Citations omitted.)...In ascertaining the intention of the parties where they have entered into a written agreement, such intention should be determined chiefly from the terms of the writing (citation omitted)....It is the intention as evidenced by the terms of the agreement, and not the subjective or undisclosed intention of the parties that controls."

Although you have not provided us with a copy of the partnership agreement including the , the Statement of Partnership executed January 7, 1985 and recorded January 22, 1985, leaves no doubt as to the intention of the parties. That document stated the name of the partnership and stated that Carl and Nancy as well as the were partners. Each of the six parties signed the document and M and W declared under penalty of perjury that the statements were true and correct.

The taxpayers' attorney, contends in his letter to the Assessment Appeals Board dated September 9, 1985, that the taxpayers did not intend the proportional ownership interests to change or to trigger a reassessment as a result of a change in ownership. Such intention is directly contrary to the intention expressed in their partnership agreement and the Statement of Partnership. Under the rules set forth above, it is the intention evidenced by the agreement which controls and not the subjective or undisclosed intention of the parties.

The amended partnership agreement of the which was recorded October 24, 1985, recites "Said partnership agreement of January 1, 1985 erroneously recited that Carl and Nancy received their partnership interest from gifts made by M and I in December, 1984. In fact, these gifts have not yet been made."

This statement seems to assume that M and I had to perform some additional act in order to create partnership interests in the . As indicated above, whether the were partners was a question of intent to be determined primarily from the written agreement of the parties. Moreover, for federal gift tax purposes, the tax court has recognized that the mere signing of a partnership agreement, followed by acts in conformity therewith was sufficient to constitute a taxable gift of a partnership interest (William H. Gross (1946) 7. T.C. 837, Walter H. Lippert (1948) 11. T.C. 783). In the latter case, the court rejected the taxpayers' contention that no gift was made because he signed no deed and executed no bill of sale and that there was no property subject to manual delivery.

In this case the execution and recording of the Statement of Partnership constituted acts in conformity with the execution of the original partnership Agreement. There may have been other acts of which we are unaware that were also in conformity.

We note in passing that the Amended Partnership Agreement states on page 10 that it was executed on January 1, 1985. This is obviously untrue since the Statement of Partnership which included the was executed on January 7, 1985.

Based on the information provided and the foregoing analysis, we would have to conclude that the became partners with the when the original partnership agreement was executed. Accordingly, the proportional ownership interests of the in the real property transferred to the partnership did not remain the same after the transfer as it was before the transfer. The transaction was therefore not excluded under Section 62(a)(2) and Property Tax Rule 462(j)(2)(B).

2. You next ask whether the "old" factored base year value can be reinstated and if so should it be done for the 1985-86 assessment year or for 1986-87.

With respect to this question, our position is that if all the parties to a transfer of property agree to "undo" the transfer and are willing to restore to each other all consideration received, the transfer of property can be rescinded. It appears that by the amendment to the partnership agreement and the written consent thereto and their statement that they gained no partnership interest that the parties have "undone" the transaction by which the became partners. This assumes of course that the have restored to the partnership any distributions they may have received until the partnership agreement was amended. The effect of such a rescission, which voids the initial transfer ab initio, would be to restore the parties to the position they held before entering into the transaction including restoration of the "old" factored base year value.

Under the theory of rescission, however, liabilities based on the facts of the situation while the transfer was in full force and effect are valid regardless of a subsequent rescission of that transfer (Long v. Newlin (1956) 144 Cal.App.2d 509; Scollan v. Government Employees Insurance Co. (1963) 222 Cal.App.2d 181). Parties remain liable for any debts validly incurred during the period before the parties rescinded their transfer.

Therefore, placing the parties in the position they held before the transfer does not include refund of the increase in property taxes caused by the change in ownership at a time when the were partners in Brothers. Property taxes are determined by the facts as they exist on the lien date of March 1,for the regular roll, or the date of change in ownership for the supplemental roll. Assessments made on those dates reflecting existing changes in ownership are valid (Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal.2d 157; Doctor's General Hospital v. Santa Clara (1957) 150 Cal.App.2d 53). Thus, rescission of the partnership agreement under which the became partners of Brothers will not provide relief from any property tax increases which vested and became liens prior to the date of rescission. Accordingly, the "old" factored base year value should be reinstated for the 1986-87 assessment year.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel

220.0505 **Partnership.** A mother and her three sons are "original co-owners" (Property Tax rule 462(j)(2)(b)) of a partnership's interests. The mother transfers 49½ percent of the interests to several people, none of whom thereby obtain control of the partnership. Two of the sons then wish to have their spouses, who are community property co-owners of the sons' original interests in the partnership, recognized as individual owners of halves of the community interests.

Since the mother did not transfer more than 50 percent of the total partnership interest, no change of ownership occurred. The subsequent recognition of the sons' spouses' interests did not raise the mother's 49½ percent transfer to more than 50 percent. The spouses already owned their interests, which were simply converted from community property to separate property status. C 9/24/90.